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No. 91-596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WAYNE ESTELLE, WARDEN,
Petitioner,

v.

DENNIS ROSA COLLAZO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Petitioner responds to arguments advanced by respondent in his Brief in Opposition in the order in which he presents them.

1. Respondent asserts that petitioner's "principal contention" -- whether a confession was a product of illegal police activity is a question of fact -- was not raised or briefed by the parties, or considered by the Court of Appeals by the Ninth Circuit. In fact, the state courts found that "the prosecution establish[ed] a break in

the causative chain between the interrogation sessions." (App. to Pet. for Cert. at 86.) This statement constitutes a finding of fact in its most pristine form. In his supplemental brief, filed on August 31, 1991, after the grant of rehearing *en banc*, petitioner argued that the state record established a "break in the causal chain" between the officer's improper statement and respondent's decision to initiate a second interview and that therefore the statement was not a product of illegal official conduct. (Supp. Brief at 6.) In short, it has *always* been petitioner's view that the officer's statement was improper but that the subsequent statement was not "fruit of the poisonous tree."

2. Respondent next suggests that until now petitioner has asserted only that the validity of the waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) -- not the validity of the confession -- was entitled to a presumption of correctness. The two issues are inextricably intertwined (see Argument 1), because an invalid waiver cannot produce a valid confession. In addition, respondent fails to reveal that *at no time* did he raise the voluntariness of the confession under the Fourteenth Amendment: not in the state courts, not in the District Court, not in his appeal to the Ninth Circuit, and not in the suggestion for rehearing *en banc*. The issue of the voluntariness of the confession was raised by the Ninth Circuit itself *for the first time* in its *en banc* opinion. In point of fact, the Ninth Circuit "sandbagged" petitioner, and respondent seeks to

exploit this unfairness by suggesting that petitioner failed to raise an issue which, until now, he really had no reason to present.

3. Respondent next contends that petitioner is now attempting to withdraw a concession which he made in the courts below. Specifically, petitioner acknowledged that the voluntariness of a confession is a legal question, "a position completely at variance with petitioner's newly-advanced argument in this Court." (Brief in Opp. at 4.) Petitioner can only repeat what he said in the petition for certiorari: whether the facts as found constitute coercion under the Fourteenth Amendment *is* a legal question, for only this Court or other courts of review can determine whether police conduct is constitutionally permissible. But resolution of a claim that a confession is involuntary also requires a determination that the statement was the *product* of the coercion, a question of cause-and-effect and, therefore, of historical fact. Petitioner has consistently argued that causation is a factual matter. He now argues before this Court that the Ninth Circuit erroneously failed to defer to the state courts' finding that the police impropriety did not produce the statement.

4. As petitioner understands respondent's fourth point, he argues that the validity of *Miranda* waiver presents a mixed question of law and fact. Petitioner can only reiterate that *de novo* review of any aspect of a *Miranda* claim is inappropriate because *Miranda* is not constitutionally compelled. If a state prisoner alleges that

a confession extracted from him was involuntary under the Fourteenth Amendment, he has presented a mixed question which entitles him to *de novo* review on the question whether official conduct amounted to coercion. But where, as here, a prisoner claims only that *Miranda* was violated, he impliedly concedes that the statement was voluntary under the Fourteenth Amendment. The remaining issue -- whether the waiver was valid -- implicates only a prophylactic rule, an issue which should be treated as a question of fact.

5. Respondent next argues that the state courts made no findings with respect to the issue of waiver. In fact, they considered and rejected respondent's *Miranda* claim, finding that he voluntarily initiated the second interview. (App. to Pet. for Cert. at 82-87.) That finding represents a determination of a valid *Miranda* waiver. *See Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983).

6. Finally, respondent suggests that "petitioner has consistently failed to address the impact of [the officer's] coercion on the issue of voluntariness." (Brief in Opp. at 6.) To the contrary, that is really what the petition for certiorari is all about. The state courts found as a matter of fact that the police impropriety (whether "truly" coercive under the Fourteenth Amendment, or "presumptively" coercive under *Miranda*) did not produce the confession. In other words, the state courts found that respondent would have confessed even if the officer had not made his constitutional *faux pas*. Thus, the confession

was the product of an independent source, identified by state courts to be respondent's desire to confess. That identification is a finding of fact, and petitioner respectfully asks this Court to direct the federal judiciary to defer to such findings in this and all cases of this species.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit be granted.

DATED: December 3, 1991

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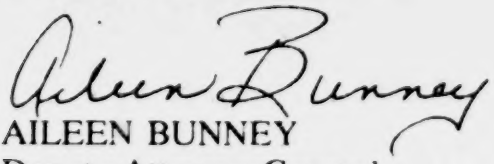

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